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Taxation -- Transfer to Take Effect in Possession or Enjoyment After Death

the degree of likelihood or remoteness of the contingency coupled with the intention of the settlor must be given full consideration.[16] Otherwise liability may be incurred by the discovery of a valueless gossamer thread of possession or enjoyment.[17]

Under the decision rendered in the instant case tax liability may be incurred irrespective of the decedent's intention, if he did not divest himself completely of all remote possibility of regaining the property. It is difficult to perceive that the decedent *intended* to make an incomplete gift by studiously reserving through silent operation of law a remote possibility of regaining possession of the corpus. The absence of intention is even more apparent if considered in the light of the status of the local law with respect to the reversionary interest at the time the trust indenture was created.[18]

The decision in the *Spiegel* case may meet with considerable criticism because the majority seemingly ignored the settlor's intent as well as the statutory language of 811(c). Yet the conclusion reached was merely the logical culmination of the trend which has prevailed in the Court as presently constituted.[19] Perhaps the result of the principal case may be avoided by naming the United States Government or a charitable organization as the ultimate remainderman.[20]

TAXATION—TRANSFER TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AFTER DEATH

In 1924, decedent, then twenty-one and unmarried, executed a trust, naming himself and two brothers as co-trustees. Decedent reserved no power to alter, amend, or revoke, but the income from the trust was to be paid to him for life, and on his death the principal was payable to his surviving issue.

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reverter at death, in the case of one of these trusts, was $.000000163 out of a corpus of approximately $395,000 and in the case of the other, $.0000000000876 out of a total value of $338,000. The return of the property in the third trust hinged upon the prior death of the grantor's daughter, the latter's issue and the latter distributees in the event of intestacy. The reverter at death was estimated as $.000046 as compared with a corpus of $362,000. Under the provisions of the fourth suit, which were similar to those of the third, the reverter was worth $.0001814 out of a trust principal of over $348,000. In Smith M. Flinkinger, P-H 1943 T.C. Memo. Dec. Serv. ¶ 43,455 (1943) the actuarial value of reverter at death was worth twenty-nine cents out of a trust corpus of $444,000.

16. Central Hanover Bank & Trust Co. v. United States, 58 F. Supp. 565, 566 (Ct. Cl. 1945). *Contra:* Thomas v. Graham, 158 F.2d 561, 563 (C. C. A. 5th 1946).

17. See Mr. Justice Frankfurter, dissenting in the present case at 345.

18. See Mr. Justice Burton, dissenting in the instant case at 310-313, where he questions the law of Illinois with respect to possibility of reverter. Mr. Justice Frankfurter suggests that the case be remanded to the state court to secure an adjudication on this issue, possibly through the procedure of a declaratory judgment. *Id.* at 348.

19. Helvering v. Hallock, *supra;* Fidelity-Philadelphia Trust Co. v. Rothensies, *supra;* Commissioner v. Estate of Field, *supra;* Goldstone v. United States, *supra;* Commissioner v. Church's Estate, 69 Sup. Ct. 322 (1949).

20. Note, *The New Hallock Regulation,* 2 TAX L. REV. 94, 101 (1946). See Spencer, *The Federal Estate Tax on Inter-Vivos Trusts: A Common Sense Rule for Hallock Cases,* 59 HARV. L. REV. 43 (1945).

If decedent left no surviving issue, the principal was payable to brothers and sisters surviving decedent, the children of any deceased brothers or sisters taking per stirpes. At the time the trust was created decedent had a brother and sister and four half brothers. At decedent's death, without issue, in 1939, he was survived by sixteen persons who were brothers and sisters of the half blood and full blood, or the children of such brothers and sisters. The actuarial value of any reversionary interest was less than three one-thousandths of one per cent. The Commissioner included the corpus in decedent's gross estate under section 811(c) of the Internal Revenue Code, which taxes transfers "intended to take effect in possession or enjoyment at or after death." *Held*, that where the settlor retained possession and enjoyment of property for life, the property is taxable under this transfer clause even though the settlor divested himself of legal title, for until the settlor's death the beneficiaries cannot get possession or enjoyment, hence until then the gift is not complete. *Commissioner of Internal Revenue v. Church's Estate*, 69 Sup. Ct. 322 (1949) (three Justices dissenting).

The instant case illustrates the continued groping by the Supreme Court to define transfers which are "intended to take effect in possession or enjoyment at or after death." [1] The problem of statutory construction, i.e., of defining the "string" under this transfer clause, has been the chief difficulty confronting the Court. Thus where a trust was created by *A*, the income of which was to be paid to *B* until five years after *A's* death, with a remainder over to *C*, it was held that there was no string merely because the termination of one estate and the beginning of another were fixed by *A's* death, since nothing passed out of the control, possession, or enjoyment of *A* at his death.[2] And in *May v. Heiner*,[3] overruled by the principal case, it was held that the transfer clause did not apply where *A* reserved the trust income for life with remainder over to *B*, for the reason that the trust deed fixed the title, and that *A's* interest in the trust income did not pass, but rather was obliterated, by *A's* death. Thus after *May v. Heiner* the string meant legal title. Since the transfer clause made no mention of title, the Commissioner then attempted to tax transfers reserving life estates, but was defeated in three per curiam

1. This clause has been interpreted as applying in a case where property was deeded with a reservation of a life income. Reish, Adm'r v. Commonwealth, 106 Pa. 521 (1884). The majority of states are in accord. See Knouff, *Death Taxes on Completed Transfers Inter Vivos*, 36 MICH. L. REV. 1284, 1298 (1938); Rottschaefer, *Taxation of Transfers Taking Effect in Possession at Grantor's Death*, 26 IOWA L. REV. 514, 516 (1941). The clause appeared in the first Federal Estate Tax Act. Revenue Act of 1916, § 202(b), 39 STAT. 777 (1916) (". . . to reach substitutes for testamentary dispositions and runs to prevent the evasion of the estate tax"). In 1900 it had been held that the United States had power to tax legacies. Knowlton v. Moore, 178 U.S. 41 (1900). The constitutionality of the estate tax prevailed over arguments that it was a direct tax and that it interfered with state laws of distribution. New York Trust Co. v. Eisner, 256 U.S. 345 (1921). But the tax was held not applicable where the passage of the act followed the completed transfer and preceded the transferor's death. Shwab v. Doyle, 258 U.S. 529 (1942).

2. Reinecke v. Northern Trust Co., 278 U.S. 339 (1929).

3. 281 U.S. 238 (1930).

opinions.[4] At the insistence of the Treasury Department, Congress subsequently enacted the Joint Resolution of March 31, taxing transfers reserving life estates. This resolution was interpreted as being prospective only.[5]

Difficulty in defining the string was similarly presented in transfers not involving reserve life estates. Thus where *A* deeded real estate to *B* for life and, on condition that *B* survive him, in fee simple, *A's* reversion in fee pulled the property within the transfer clause.[6] This rule was later restricted so that if the devisee's interest was fully vested even though subject to divestment at the time of the settlor's death, there was no string.[7] This distinction between vested and contingent remainders was rejected in the celebrated *Hallock* case,[8] which found a harmonizing principle in *Klein v. United States*,[9] stating medieval property concepts as to the necessity of continuous seisin preclude a workable tax system dealing largely with intangible wealth. Subsequent litigation has reemphasized the *Hallock* doctrine.[10]

In the instant case although the only issue presented by the parties in the Tax Court was whether there existed a possibility of reverter within the *Hallock* rule, some uncertainty as to harmonizing principles was indicated after the case reached the Supreme Court in that an order was entered restoring the case to the docket and propounding questions broader in scope than those originally argued.[11]

The facts of the principal case would appear to weaken the result, for since the transfer did not provide for all possible contingencies, it might have been held that there was a sufficient contingent reversionary interest as to come within the doctrine of the *Hallock* and companion cases. Apparently wishing to escape dependence on state law, however, the Court rested the decision on the incompatibility of the *May* and *Hallock* cases. But the *Hallock* case did not expressly overrule *May v. Heiner*, nor can it be said to have done so *sub silentio*. There is an important distinction in that in the *Hallock* case there was an uncertainty due to a contingent reversionary interest terminable at the grantor's death that the remainderman would ever possess and enjoy the property, whereas in the *May* case there was no such uncertainty. Thus it appears that the *May* and *Hallock* cases can maintain at least a cool friendship.

An additional reason for differing with the Court's opinion arises in its

4. Morsman v. Burnet, 283 U.S. 783 (1931); Burnet v. Northern Trust Co., 283 U.S. 782 (1931); McCormick v. Burnet, 283 U.S. 784 (1931).

5. Hassett v. Welch, 303 U.S. 303 (1938), *But see* E. Pennington Person, 36 B.T.A. 5 (1937) (where the court held the resolution applicable to subsequent additions to prior transfers).

6. Klein v. United States, 283 U.S. 231 (1931).

7. Helvering v. St. Louis Trust Co., 296 U.S. 39 (1935); Becker v. St. Louis Trust Co., 296 U.S. 48 (1935).

8. Helvering v. Hallock, 309 U.S. 106 (1940).

9. 283 U.S. 231 (1931).

10. Fidelity-Philadelphia Trust Co., v. Rothensies, 324 U.S. 108 (1945); Commissioner v. Estate of Field, 324 U.S., 325 U.S. 687 (1945).

11. Journal Supreme Court, 297-298, June 21, 1948.

break with established precedent. Although Frankfurter, J., in dissenting, strongly urged application of the doctrine of stare decisis, the majority drew comfort from the opinion rendered by the same Justice in the *Hallock* case. It is to be remembered that there the Court was confronted with the *St. Louis Trust* cases which had been decided only five years previously, and which appeared to conflict with the *Klein* case. But here the latest decision was eleven years old.[12] Moreover, there were no conflicting opinions. The decisions uniformly exempted pre-1931 transfers reserving life estates.

Unlike the *Hallock* case, there is present in the principal case an element of reliance by the taxpayer. The decisions exempting pre-1931 transfers were rendered during the decedent's lifetime. The Treasury regulations complied with such decisions.[13] In the *Hallock* case, on the other hand, the settlements had been made, and the settlors had died before the decisions had been rendered in the *St. Louis Trust* cases.

Unlike the *Hallock* situation, the earlier decisions in this case were not enveloped in congressional silence, but rather were followed by prompt action leading to changes which were intended to be prospective only.[14] Moreover, Congress can not be said to be ignorant of an interpretation "that came like a bombshell," [15] and on which there was a full debate resulting in only partial modification.

Thus it would appear that the Court's break with precedent is not warranted by the facts of the principal case.

A cryptic dictum in the principal case is the statement that, "an estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor absolutely, unequivocally, irrevocably, and without possible exception parts with all of his title . . ." indicates a possible extension of the *Clifford* case.[16] In that case income of five-year trust, although payable to the settlor's wife, was held taxable to the settlor. The apparently indispensable factors were (1) a short term trust, (2) settlor as sole trustee, and (3) a family relationship. It is clear that these factors were not present under the facts of the *Church* case.

Two probable consequences of the decisions in the principal case are: (1) clogging of the operation of regulations promulgated by the Treasury in 1946, [17] which set up a test based on the difference between a reversion contingent upon the grantor's death, and a reversion dependent upon some other contingency. The decision is broad enough to render the survivorship test

12. Hassett v. Welch, 303 U.S. 303 (1938).
13. U.S. Treas. Reg. 37, Art. 24 (1916).
14. *See e.g.*, Hearings before Committee on Ways and Means on Revision, 1932, 72d Cong., 1st Sess. 7, 42-43; Hearings before Committee on Finance on The Revenue Act of 1932, 72d Cong., 1st Sess. 33, 51; 75 CONG. REC. 5787, 7241 (1932).
15. 74 CONG. REC. 7078 (1931).
16. Helvering v. Clifford, 309 U.S. 331 (1940).
17. U.S. Treas. Reg. 105, § 81.17, as amended, T. D. 5512 (1946).

obsolete; (2) some relief measure similar to that passed after the *Hallock* case.[18] This step should be taken, in all fairness, at least in those cases where the decedent has created the trust before 1931 and has refrained from relinquishing his life estate in reliance upon Supreme Court decisions and Treasury regulations.

VENUE—EFFECT OF THE NEW JUDICIAL CODE ON THE FEDERAL EMPLOYER'S LIABILITY ACT

In a suit under the Federal Employer's Liability Act by an employee of the defendant railroad company to recover damages for injuries sustained by him during the course of his employment, the defendant moved for an order transferring the cause to the United States District Court in Ohio, where the injuries occurred, pursuant to 28 U. S. C. A. § 1404(a).[1] Venue under the FELA [2] is in the district where the defendant resides, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action. Section 1404(a) provides in essence that a district court may transfer *any* civil action to any other district where the action might have been brought, for convenience of parties or in the interest of justice. *Held*, motion denied, Section 1404(a) is not applicable to actions brought under the FELA. *Pascarella v. New York Cent. R. R.*, 81 F. Supp. 95 (E. D. N. Y. 1948).

Section 1404(a) of the new Judicial Code is similar to the doctrine of forum non conveniens [3] which is enforced in the federal courts.[4] However, as to actions brought under the FELA the doctrine has not been applied. It has been held that once the criteria of venue is satisfied, an action under the FELA should not be dismissed on the ground of forum non conveniens,[5] that venue in the FELA is an inherent part of the employer's liability,[6] that the venue right given to a plaintiff under the FELA should not be limited or abridged,[7] and that the privilege of venue conferred by the FELA is absolute.[8] In *Baltimore & Ohio R. R. v. Kepner* [9] the railroad sought in an Ohio court to enjoin Kepner from prosecuting an action in a federal court in New York.

18. See T. D. 5008 (1940); U.S. Treas. Reg. 105, § 18.17 (1934 ed).

1. Based on 36 STAT. 1103 (1911), 39 STAT. 851 (1916), 28 U. S. C., §§ 119, 163 (1940).
2. 36 STAT. 291 (1910), as amended, 36 STAT. 1167 (1911), 45 U. S. C. § 56 (1940).
3. "The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *See* Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 507 (1947).
4. Gulf Oil Corporation v. Gilbert, *supra*.
5. Butts v. Southern Pac. R. R., 69 F. Supp. 895 (S. D. N. Y. 1947).
6. Akerly v. New York Cent. R. R., 168 F.2d 812 (C. C. A. 6th 1948).
7. Stierhoff v. Chesapeake & O. R. R., 8 F. R. D. 54 (S. D. N. Y. 1947).
8. Sacco v. Baltimore & O. R. R., 56 F. Supp. 959 (E. D. N. Y. 1944).
9. 314 U. S. 44 (1941).